

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****APPEAL FROM ORDER (ST) NO. 31150 OF 2015****IN****NOTICE OF MOTION NO.3937 OF 2013****IN****L.C.SUIT NO. 4195 OF 2013****Farohar Bar and Restaurant****..... Appellant
(Original Plaintiff)****VERSUS****The Municipal Corporation of Gr. Mumbai
& Anr.****..... Respondent
(Original Defendants)**

Ms.Firdaus Moosa, i/b. Mr.Prakash Mahadik for the Appellant.

Ms.M.R.Bhoir for B.M.C.

CORAM : R.D. DHANUKA, J.**DATED : 20th NOVEMBER, 2015****P.C.**

By this appeal, the appellant has impugned the order dated 24th October, 2015 passed by the learned trial judge dismissing the Notice of Motion No. 3737 of 2013 filed by the appellant (original plaintiff) which was for restraining the Municipal Corporation from taking any action pursuant to the notice issued under section 351 of the Municipal Corporation Act dated 20th July, 2011 and the order dated 31st October, 2013. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The Municipal Corporation had issued a notice on 13th January 1981 to the appellant under section 351. It is the case of the appellant that suit construction has been assessed since 1975. Learned counsel appearing for the appellant states

that pursuant to the notice dated 13th January 1981, the suit premises was regularized on payment of penalty of Rs.30,200/- on 30th March 1983. The suit filed by the appellant however remained pending in the City Civil Court.

3. On 20th July, 2011, the Municipal Corporation issued a fresh notice under section 351 of the Bombay Municipal Corporation Act alleging unauthorized construction in the open space without prior permission of the Municipal Corporation. The nature of construction and the extent of the alleged unauthorized construction is setout in the said notice. The appellant replied to the said notice dated 25th July, 2011. By an order dated 30th November, 2013, the Municipal Corporation passed an order for demolition of the suit structure. The appellant impugned the said notice as well as order passed by the authority in response to the said notice after hearing the appellant by filing a separate suit i.e. L.C. Suit No.4195 of 2015.

4. Learned counsel appearing for the appellant submits that the structure alleged to be unauthorized in the notice dated 20th July, 2011 was the same structure which was already regularized by the Municipal Corporation on receipt of penalty of Rs.30,200/- on 30th March, 1983 which was the subject matter of the earlier notice dated 13th January, 1981. She submits that the Corporation having regularized the entire structure as far back as on 13th March, 1983, the Corporation could not have issued a fresh notice in respect of the said structure under section 351 of the Municipal Corporation Act. She submits that even if the said structure was not constructed prior to the datum line, the fact remains that the said structure which was the subject matter of the second notice was regularised and thus no fresh notice could be issued by the respondent. Learned counsel submits that the learned trial judge has not considered this crucial aspect and has passed the impugned order mechanically.

5. Learned counsel for the Municipal Corporation on the other hand invited my attention to the text of the notice dated 13th January 1981 and notice dated 20th July 2011 and would submit that the extent and nature of the construction carried out as reflected in the notice dated 13th January 1981 and notice dated 20th July 2011 were totally different. She submits that the structure that was regularized by the Municipal Corporation on payment of penalty of Rs.30,200/- on 30th March 1981 was only in respect of the loft which was subject matter of the notice dated 13th January 1981 and there was no regularization of the structure reflected in the notice date 20th July, 2011. She submits that the appellant though was given an opportunity to produce document to show that the said construction was prior to the datum line, the appellant failed to produce any such document. She submits that the concerned officer of the Municipal Corporation has considered all the documents whatever were produced by the appellant in response to the notice dated 20th July, 2011 and has passed detailed order. She submits that the learned trial judge has also considered the documents and was right in passing the order of rejection of the notice of motion filed by the appellant.

6. A perusal of the notices dated 13th January 1981 and 20th July, 2011 issued by the Municipal Corporation which are forming part of the record prima facie indicates that the structure mentioned in the notice dated 20th July, 2011 is different than what is mentioned in the notice dated 13th January, 1981. A perusal of the receipt issued by the Municipal Corporation while accepting the penalty of Rs.30,200/- does not indicate that the said penalty was accepted by regularizing the entire structure as canvassed by the learned counsel for the appellant. It clearly indicates that the said penalty was recovered only for regularizing loft which was subject matter of the notice dated 13th January 1981. I am thus not inclined to accept the submission of the learned counsel for the appellant that by accepting the

payment of Rs.30,200/-, the respondent had regularized the portion of the structure which was subject matter of the notice dated 20th July 2011. Even nature of construction referred in both the notices are different.

7. A perusal of the order passed by the learned trial judge clearly indicates that the learned trial judge has passed a detailed order after considering the pleadings and documents produced by both the parties and has come to a prima facie conclusion that there was no regularization in respect of the construction mentioned in the second notice. It is not in dispute that the appellant did not produce any document to show that the structures which were subject matter of the notice dated 20th July, 2011 were constructed prior to datum line. Learned counsel for the appellant fairly stated that it was not her case that the said structure was constructed prior to datum line. The only argument is that the structure mentioned in the notice dated 20th July, 2011 was also regularised which is my prima facie view is contrary to the documents on record.

8. The order passed by the learned trial judge refusing to grant relief in favour of the appellant is correct. I do not find any infirmity in the said order. Appeal is devoid of merits and is accordingly dismissed. In view of the disposal of the appeal from order, the civil application does not survive and is accordingly dismissed.

9. At the request of the learned counsel for the appellant, which is vehemently opposed by the learned counsel for the Municipal Corporation, interim stay to continue for a period of eight weeks from today. It is made clear that the appellant shall not carry out any further construction in the property.

[R.D. DHANUKA, J.]